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IN THE

Supreme Court of the United States

October Term 1974

No. 74-1307

JOHN BOWMAN, HAROLD TAYLOR, and RAY MICHAEL BOUDREAUX,
Petitioners,

vs.

PRESIDING JUDGE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES AND JURY COMMISSIONER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondents.

On a Petition for a Writ of Certiorari
Directed to the Court of Appeal of the State of California

BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents, Presiding Judge of the Superior Court of the State of California for the County of Los Angeles and the Jury Commissioner of the Superior Court of the State of California for the County of Los Angeles, oppose the issuance of the Writ of Certiorari petitioned for in this case on grounds stated herein.

I

QUESTIONS PRESENTED

1. Does the selection of jurors by random method solely from the current list of registered voters, in the absence of any intention or purpose to discriminate or any systematic exclusion, raise a substantial federal question where the resulting jury panel may contain a disproportionately low number of poor persons?

2. Is there any federally protected right to a hearing in a state appellate court before such court can grant a writ upon a noticed petition served on the parties?

II

STATEMENT OF CASE

Annually in accordance with state law (Code of Civil Procedure Section 204d) a majority of the approximately 160 judges of the Superior Court of the State of California for the County of Los Angeles certify a panel of trial jurors for the ensuing year. Pursuant to state statutes (Code of Civil Procedure Sections 204b and 255), a majority of such judges have established a court rule governing the procedures for selecting jurors, which provides as follows:

> "The names of prospective trial jurors shall be taken from the last published and available registered voters' list of Los Angeles County through the use of automated random selection." Local Rule 25.

The 1970 census showed that Los Angeles County had a population of 7,032,075 persons of whom 4,772,-057 were eighteen years of age or older. The September 1974 list of registered voters for the County of Los Angeles contained approximately 3.2 million names. In a typical year (1972), 200,000 questionnaires were sent to names randomly selected from the voters' list. About three-quarters of these persons failed to respond or were excused, resulting in about 55,000 persons being certified for jury service in the ensuing year for the nine judicial districts of Los Angeles County.

The list of jurors to serve in 1974 was similarly selected, screened, and certified by a majority of the judges. However, on October 11, 1974, a single judge granted a pre-trial motion of petitioners (defendants below) in the case of *People* v. *Taylor,* No. A277425 to quash the jury venire for the Central District of the County (comprising a population of about 1,500,000 persons) and ordered the jury commissioner to provide a panel not chosen solely from the voters' registration list and which would represent (impliedly proportionately) "a fair cross-section of all segments of the community, including the poor."

On November 8, 1974, respondents, the presiding judge and the jury commissioner of the county, filed a petition for writ of mandate with the California Court of Appeal and served copies on the petitioners herein. That petition alleged that:

1. The selection of jurors from the list of regis-

tered voters in the absence of systematic and intentional exclusion of cognizable groups was constitutional;

2. A single judge may not order a jury panel to be furnished other than that certified by a majority of the judges;
3. The poor are not a cognizable class for this purpose; and
4. The facts did not support the order.

On November 26, 1974, the Court of Appeal granted without hearing a peremptory writ of mandate ordering the trial judge to vacate his order.

Petitioners herein filed a petition for rehearing in the Court of Appeal, which was summarily denied. Petitioners then filed a petition for hearing in the California Supreme Court which was also summarily denied. Petitioners now seek review of the final order of the Court of Appeal granting the writ of mandate.

III

THE SOLE SELECTION OF JURORS FROM VOTER REGISTRATION LISTS IS CONSTITUTIONAL IN THE ABSENCE OF SYSTEMATIC AND PURPOSEFUL EXCLUSION OF COGNIZABLE GROUPS

The massive jury selection required for the County of Los Angeles is conducted in a manner free from purpose or motive of bias, as even trial judge's order in *People* v. *Taylor, supra,* admits.

> "There is no contention that the Superior Court ever intentionally maintained the registration list as an exclusive means of selecting jurors for the purpose of diluting representation of the group or groups of people to which the defendants belong."
>
> *People v. Taylor, supra,* Order of October 14, 1974[1] p. 3

The sophisticated, computer age, automated random selection of jurors from the voter registration lists rules out even the possibility of individual bias on the part of the jury commissioner or his staff. Moreover, California law encourages the registration of persons to vote and bars any form of voter registration fee. Elections Code Sections 201 and 219. For each of Los Angeles County's more than 4,000 election precincts a position of deputy registrar of voters is authorized, to be paid at the rate of $0.35 per person registered. Los Angeles County Ordinance No. 6222.

The trial court found no intention to exclude any group, but believed that the system of exclusively using voter registration lists resulted in a disproportionately low number of poor persons serving as jurors. The trial judge felt that the de facto disproportion of poor persons was unconstitutional. However, this Court has long held that a jury panel will not be held constitutionally infirm in the absence of systematic *and* intentional (or purposeful) exclusion of cognizable groups. This Court has said:

[1]Hereinafter referred to as the Order.

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. [citations omitted] This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does not mean that propective jurors shall be selected by court officials without *systematic and intentional exclusion* of any of these groups."

Thiel v. Southern Pac. Co. (1946) 328 U.S. 217, 220, 90 L.Ed. 1181.

In June of last year this Court again dealt with this question. The Court confronted a challenge to the jury panel of the federal district court for the Southern District of California which was drawn solely from the voter registration list and which was updated only every four years, providing a panel in the fourth year with no persons under 24 years old. The Court summarized the petitioners' claim as follows:

"Petitioners' second procedural contention is that the trial jury was improperly constituted because an allegedly cognizable class of citizens, 'young adults', which petitioners define as those between the ages of 18 and 24 years, were systematically excluded."

Hamling v. United States (1974) ..... U.S. ....., 41 L.Ed.2d 590, 631.

Even though it was clear that the current panel *absolutely* excluded every person under 24 years of age, the Court agreed that there was no evidence of a purposeful, systematic exclusion of the purported class.

> "The Court of Appeals assumed, without deciding, that the young do constitute a cognizable group or class, but concluded that petitioners had 'failed to show, let alone establish, a *purposeful, systematic exclusion* of the members of that class whose names, but for such systematic exclusion would otherwise be selected for the master jury wheel; and therefore, that the District Court's refusal to grant a continuance was not an abuse of discretion.' 481 F.2d, at 314. We agree with the Court of Appeals."
>
> *Hamling, supra,* 41 L.Ed.2d at 632. (Emphasis added.)

The mere *de facto* exclusion of a certain age group was viewed as insufficient to establish even a *prima facie* case of unconstitutional discrimination in jury selection. Clearly, the standard of "purposeful, systematic exclusion" carries with it a requirement of purpose to discriminate.

> "Assuming as did the Court of Appeals, that the young are such a group, we do not believe that there is evidence in this case sufficient to make out a prima facie case of discrimination which would in turn place the burden on the Government to overcome it."
>
> *Hamling, supra,* 41 L.Ed.2d at 632.

"But if the jury wheel is not discriminatory when completely updated at the time of each refilling, a prohibited 'purposeful discrimination' does not arise near the end of the period simply because the young and other persons have belatedly become eligible for jury service by becoming registered voters."

Hamling, supra, 41 L.Ed.2d at 633; see also *United States v. Bennett* (9th Cir. 1971) 445 F.2d 638, 641, cert den. 404 U.S. 1023, 30 L.Ed.2d 673;

The trial court, on the other hand, erroneously construed the standard to be applied as follows:

"If systematic jury discrimination exists, it is immaterial whether it is intentional or unintentional."

Order at page 16, lines 31-32.

That the standard is erroneous is obvious. If "discrimination" were construed to connote intention or purposeful act, then the remainder of the sentence is meaningless. Moreover, the trial judge concluded that:

"There is no contention that the Superior Court ever intentionally maintained the registration list as an exclusive means of selecting jurors for the purpose of diluting representation of the group or groups of people to which the defendants belong."

Order at page 3, lines 6-10.

Under federal case law such a standard is erroneous and cannot result in shifting the burden to the

Government to justify any statistical discrepancies in the composition of the jury panel. Since this erroneous standard was at the heart of the trial judge's Order, it was properly ordered vacated by the Court of Appeal.

IV

THE POOR ARE NOT A COGNIZABLE GROUP SYSTEMATICALLY EXCLUDED FROM JURY SERVICE

Certainly not all poor or minorities are excluded from jury service by use of voter registration lists, since statistics show that the heavily poor and minority Central District has voter registration almost identically proportionate with its population as compared with the County as a whole.[2] Once a person is on the voter registration list, there is no claim that other than random selection is followed, in which all persons, rich and poor, are treated the same by the impersonal computer.

Further, no fee is charged for voter registration. Election Code Section 219. On the contrary deputy registrars of voters are paid for each name they register. Consequently, the "poor" here are not a class defined by the effect of the law, *i.e.*, those who cannot afford to pay the fee and are thereby excluded from a right or privilege. The trial judge viewed the "poor" instead as a class in the abstract, for all purposes. No authority supports this novel proposition.

[2] 20% of County's population. *Bradley* v. *Judges* (C.D. Cal. 1974) 372 F.Supp. 26, 29 and 22% of County's registered voters, *Adams* v. *Superior Court* (2d Dist. 1972) 27 Cal.App.3d 719, 725, 727.

All persons may seek excusal from jury service for statutory reasons. Code of Civil Procedure Section 200 and 202. As noted 75% of those initially selected from the voter registration lists fail to respond or are excused.[3] The only other persons excluded from jury service are those persons, whether rich or poor or minority or white, who are not on the voter registration list. The Court of Appeals has held that persons who fail to register to vote cannot be viewed as a cognizable group.

> "The Court and others have held that those who do not choose to register to vote cannot be considered a 'cognizable group.' Grimes v. United States, *supra;* United States v. Caci, 2 Cir., 1968, 401 F.2d 664, 671; United States v. Kelly, 2 Cir., 1965, 349 F.2d 720, 778, cert. denied, 384 U.S. 947, 86 S.Ct. 1467, 16 L.Ed.2d 544; Gorin v. United States, 1 Cir., 1963, 313 F.2d 641, 644, cert. denied, 374 U.S. 829, 83 S.Ct. 1870, 10 L.Ed2d 1052. The fact that some persons may from religious conscience or otherwise choose not to register or vote does not, in our view, convert that subclass of non-voters into a 'cognizable group.' "
>
> *Camp v. United States* (5th Cir. 1969) 413 F.2d 419, 421, cert. den. 396 U.S. 968.

Even if there were a cognizable class of the non-resgistered poor, the class is not systematically and intentionally excluded from jury service, since all

[3]The Order did not consider the composition of those excused. Order, p. 4.

class members are free to register. The Ninth Circuit disposed of a similar claim with respect to young persons as follows:

> "First, Ross argues that the Plan's use of voter registration lists as the exclusive source of names of potential jurors is in violation of 28 U.S.C. § 1863 (b)(2). This is so, he says because young people are less politically active than their elders and hence less likely to register to vote. This argument is without merit. The Act and its legislative history clearly contemplate that the use of sources other than voter lists will be the exception rather than the rule. 28 U.S.C. § 1863(b)(2); 1968 U.S. Code Cong. & Admin.News, pp. 1793-95. Ross has not alleged that the right of young persons to register to vote has been inhibited in any way. Under such circumstances, exclusive reliance upon voter lists did not violate the Act. United States v. Bennett, 9 Cir., 1971, 445 F.2d 638, 641; Camp v. United States, 5 Cir., 1969, 413 F.2d 419, 421."
>
> *United States v. Ross* (9th Cir. 1972) 468 F.2d 1213, 1216 (footnote omitted), cert. den. 410 U.S. 989.

It is clear then that the poor are not a cognizable group and, in any event, are neither systematically nor intentionally excluded from jury service in Los Angeles County.

V

NO FEDERAL QUESTION IS PRESENTED BY THE ISSUANCE OF THE PEREMPTORY WRIT OF MANDATE BY THE CALIFORNIA COURT OF APPEAL

Petitioners apparently perceive a due process requirement for a hearing in an appellate court prior to the issuance of a writ to an inferior court. California law has no such requirement. Code of Civil Procedure Section 1088 provides in relevant part that:

> ". . .[I]f the application [for a writ] is upon due notice and the writ is allowed, the peremptory may be issued in the first instance. . . . The notice of the application, when given, must be at least ten days."

In this case the petition for writ was filed and served on the petitioners on November 8, 1974 and the peremptory writ was not issued until November 26, 1974. Petitioners thus had notice and eighteen days in which to file any opposition they chose. The Court of Appeal had before it at the time of its summary decision: the petition, the trial court's twenty-eight page opinion, an argumentative six page request for an extension of time filed by real parties in interest, and several volumes of trial transcripts submitted by both sides. Moreover, the trial court and the real parties in interest filed extensive arguments in their petitions for rehearing. In denying those petitions the Court of Ap-

peal must be presumed to have considered the arguments presented.

The California courts had recently upheld the validity of the same jury panel chosen solely from voter registration lists. *People* v. *Sirhan* (1972) 7 Cal.3d 710, *People* v. *Powell* (2d Dist. 1974) 40 Cal.App.3d 107, *Adams* v. *Superior Court* (2d Dist. 1972) 27 Cal.App. 3d 719. The United States Supreme Court had upheld a similar panel. *Hamling* v. *United States* (1974) ..... U.S. ....., 41 L.Ed.2d 590. No hearing was therefore necessary or useful.

Petitioners herein, the real parties in interest in the California writ proceeding, can, of course, raise the issue of the validity of the jury panel in the appeal from any conviction in their criminal trials.

In short, there is no right to a *hearing* before an appellate court can issue a pre-trial writ upon noticed motion.

VI

CONCLUSION

Since there was not any intentional or systematic exclusion of any cognizable group from the jury panel by the sole use of the voter registration list, the California Court of Appeal violated no federal standard in ordering the trial judge to vacate his order quashing the jury panel.

The single judge in this case exceeded his jurisdiction and ignored binding precedent of the higher Cali-

fornia courts in ordering the jury commissioner to provide a jury panel different from that certified by a majority of the judges and contrary to a local rule adopted by a majority of the judges.

The trial judge erred in believing that a mere de facto under-representation of the poor, if such existed, violated constitutional standards in the absence of purposeful or intentional discrimination.

Moreover, there was notice and an opportunity to file opposition before the peremptory writ was issued and there is no federally protected right to a hearing before a State Court of Appeal issues a writ.

For these reasons, the petition for writ of certiorari should be denied.

Dated: May 15, 1975

Respectfully submitted,

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